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Lifting the Veil on Punishment

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INTRODUCTION

When the state punishes a person, it treats him as it ordinarily should not. It takes away his property, throws him in prison, or otherwise interferes with his liberty. Theories of punishment try to explain why such harsh treatment is nonetheless morally permissible, if not morally obligatory. Such theories often seem to take for granted that the state in question is an upright one. It punishes only acts, not thoughts, and only acts involving intentional harm-causing or -risking to others.[1] It distributes wealth and power among its citizens more or less fairly, and it never punishes the innocent, at least not intentionally.

Alas, our world is not so ideal. Among other things, the states in which we live fail, one might reasonably believe, to distribute wealth and power fairly among their citizens. Nor are the criminal justice systems they superintend flawless, not least of which because they

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1. The idea that the state should punish someone only if he has caused or risked harm to another is often understood as a defining feature of a liberal state. See John Stuart Mill, On Liberty 13 (Currin V. Shields ed., 1956) (1859) (classic statement of the "harm principle"); see also Joel Feinberg, Harm to Others: The Moral Limits of the Criminal Law (1984) (contemporary analysis and defense).

Despite the longstanding partnership between liberalism and the harm principle, Dan-Cohen has recently made the case that the time has come for liberalism to replace the harm principle with what he calls the "dignity principle," according to which the "main goal of the criminal law is to defend the unique moral worth of every human being." Meir Dan-Cohen, Defending Dignity, in Meir Dan-Cohen, Harmful Thoughts: Essays on Law, Self, and Morality 150 (2002); cf. Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1666 (1992) (arguing that retributive punishment is an appropriate response to actions constituting an "affront to the victim's value or dignity"). For critical comment on an earlier version of Dan-Cohen's proposal, see Kent Greenawalt, Dignity and Victimhood, 88 Cal. L. Rev. 779 (2000).

sometimes convict and punish the innocent. So even if an ideal state is morally permitted (or even obligated) to punish, can the same be said of states like the ones in which we live, whose hands are not so clean? If so, what principles must such fallen states follow in order to lend legitimacy to the punishment they impose?

In order to answer these questions, Sharon Dolovich invites us to imagine ourselves as parties to the original social contract.[2] She places us in the "original position" behind a "veil of ignorance"—ideas synonymous with the work of John Rawls[3]—where we don't know who we are or where we will end up in the social pecking order when the veil is lifted. Once there, we are asked to identify the principles of legitimate punishment in a non-ideal liberal democracy,[4] one which has failed to satisfy the demands of

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2. Sharon Dolovich, Legitimate Punishment in Liberal Democracy, 7 Buff. Crim. L. Rev. 307 (2004). Two brief comments on Dolovich's overall project: First, although Dolovich sets out to identify the principles of legitimate punishment in a liberal democracy, she focuses exclusively on the punishment of incarceration. See id. at 325. Her project might therefore be more aptly characterized as a search for the principles of legitimate *imprisonment* in a liberal democracy. This focus on imprisonment is certainly warranted for the reasons Dolovich gives, but one should also bear in mind the considerable literature urging us to search for so-called intermediate sanctions between probation and prison. See generally Norval Morris & Michael H. Tonry, Between Prison and Probation (1990).

Second, although the search for principles of legitimate punishment in a liberal democracy is a necessary and laudable task, it seems to me that some of the most controversial developments associated with our criminal justice system are not really aimed at punishing crime at all. They are aimed at preventing it. If so, then another pressing task is to develop principles of legitimate preventative detention. For discussions of these developments, focusing on the need to address them as practices of preventative detention, and not as practices of punishment, see generally Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429 (2001); Carol S. Steiker, Foreword: The Limits of the Preventive State, 88 J. Crim. L. & Criminology 771 (1998).

3. See John Rawls, A Theory of Justice 17, 136 (1971). Dolovich relies primarily on the analysis Rawls presents in *A Theory of Justice*. She relies less on arguments presented in his subsequent work. See Dolovich, supra note 2, at 315 n.19.

4. According to Dolovich, punishment is "legitimate" if and only if its imposition is consistent with the principles she believes would be adopted behind the veil of ignorance, but she does not say whether the state is obligated or merely permitted to punish if and when those principles are satisfied.

distributive justice, and which sometimes convicts and punishes the innocent.[5]

Scholarly efforts to deploy Rawls's method to the problem of punishment have been made before,[6] but none, so far as I know, is as detailed, subtle, or sophisticated as that of Dolovich. I won't question the logic leading the Dolovichian contractors to the principles they ultimately embrace. Nonetheless, once the contractors step outside the original position and reflect on the principles they've adopted, it seems to me they will ultimately be

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5. When Dolovich refers to the conviction of those who are (factually) innocent, I assume she means to draw no distinction between cases in which the relevant state actors were negligent with respect to the fact that the defendant was innocent and those in which they knew the defendant was innocent. Dolovich's references to the risk of finding oneself the "target" of state punishment does nonetheless encourage the image of state actors singling out for prosecution and punishment citizens they know to be innocent.

6. The literature on Rawls's theory of justice as it relates to the justification and practice of punishment appears generally to focus on two issues. The first involves identifying the moral principles the parties behind the veil of ignorance would select to regulate the state's use of punishment. On this issue, see, for example, Nigel Walker, Why Punish? 92-95 (1991); Samuel J.M. Donnelly, The Goals of Criminal Punishment: A Rawlsian Theory (Ultimately Grounded in Multiple Views Concerned with Human Dignity), 41 Syracuse L. Rev. 741 (1990); David A. Hoekema, The Right to Punish and the Right to Be Punished, in John Rawls' Theory of Social Justice: An Introduction 239 (H. Gene Blocker & Elizabeth H. Smith eds., 1980); Jan Narveson, Three *Analysis* Retributivists, 34 Analysis 185 (1974); Thomas W. Pogge, Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions, in The Just Society 241 (Ellen Frankel Paul et al. eds., 1995); James P. Sterba, Retributive Justice, 5 Pol. Theory 349 (1977). Dolovich's article is primarily addressed to this issue. She notes the arguments of some of the just-cited authors at Dolovich, supra note 2, at 322 n.34.

The second issue involves the apparent asymmetry and potential inconsistency in Rawls's treatment of moral desert with respect to the principles of justice governing the distribution of social goods on the one hand and the principles of justice governing punishment on the other. On this issue, see, for example, Michael J. Sandel, Liberalism and the Limits of Justice 89-92 (1982); Stanley C. Brubaker, Can Liberals Punish?, 82 Am. Pol. Sci. Rev. 821 (1988); B. Honig, Rawls on Politics and Punishment, 46 Pol. Res. Q. 99 (1993); Eugene Mills, Scheffler on Rawls, Justice, and Desert, 23 Law & Phil. 261 (2004); Jeffrey Moriarity, Against the Asymmetry of Desert, 37 Noûs 518 (2003); Samuel Scheffler, Justice and Desert in Liberal Theory, 88 Cal. L. Rev. 965 (2000). Dolovich addresses this issue briefly in a footnote. See Dolovich, supra note 2, at 397 n.224.

disappointed.[7] But before I explain why, let me first say what the principles are and how, according to Dolovich, the contractors come to endorse them.

I.

Rawls uses the original position to derive principles of distributive justice, principles designed to govern the fair distribution of the burdens and benefits of social cooperation. Rawls asks his contractors to agree upon these principles from behind a "veil of ignorance." The parties know not who they are, nor what position they will occupy in the social order. Moreover, the parties also assume they are legislating for a world of "strict compliance," a world in which citizens are among other things assumed to act justly toward one another. Of course, crime isn't much of a problem in a world of strict compliance, and questions about the legitimacy of punishment don't seem all that pressing.[8]

Dolovich sets aside the assumption of strict compliance. She asks the parties to assume they will be entering a world of "partial compliance,"[9] which differs from a strict-compliance world in three ways. First, citizens in a partial-compliance world do act unjustly: they do commit crimes against one another, either in defiance of the law, or in a moment of weakness and temptation.[10]

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7. I join Dolovich in doubting the legitimacy of the practices and states of affairs she describes in part V of her article, but I find the principles she uses to question those practices and states of affairs problematic in the ways described in the text.

8. A society populated with people assumed to want to act justly toward one another would still need sanctions for noncompliance, albeit only for the limited purpose of coordinating their collective actions and assuring their continued cooperation with one another. See Dolovich, supra note 2, at 327 n.43, 350 n.129.

9. For a description of the conditions of strict compliance, see id. at 351. Departures from these conditions constitute a partially compliant world.

10. Dolovich sometimes seems to imply that most criminal offenders commit crimes only out of weakness in the face of "pressures and temptations," and not out of anything like defiance. See id. at 369. She also suggests that the contractors may sometimes lack the "moral resources" to be "able" to resist those "pressures and temptations" to offend. See id at 369-73. But if the contractors really believe they will face pressures or temptations so strong as to render them

Some of these crimes are "serious," consisting of acts that "credibly and seriously" violate or threaten to violate another's "security and integrity,"[11] without which the freedom to pursue one's goals and interests would be seriously jeopardized. Others crimes are "non-serious," entailing no such violation or carrying no such threat.[12]

Second, state actors in a world of partial compliance sometimes make mistakes, faultlessly or negligently punishing the innocent, or perhaps even intentionally doing so, in which case the state itself is guilty of a serious offense. The state in a partial-compliance world can thus not only protect us against the depredations of our fellow citizens. It can also be a source of depredation, a threat to our security and integrity, using against us the power we give it to protect us.[13]

Third, the state in a partial-compliance world does not fully honor the principles of distributive justice. Citizens do not share equally in the basic liberties to which all are entitled, if only because some of them are victims of crime, either at the hands of fellow citizens or at the hands of the state.[14] Nor are the primary social goods of the society

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on occasion *unable* to conform their conduct to the requirements of law, then they should insist that the state provide them with an excuse on such occasions. In this regard, one should distinguish between pressures and temptations that make it hard to conform and those that make it either impossible or unreasonably hard to do so. The latter kinds of pressures and temptations might provide the basis for an excuse; the former would not.

11. Id. at 386. "Security and integrity" are broadly described as goods consisting of "security from assault on and interference with [one's] physical and psychological integrity and well-being, and protection against any who would compromise these goods or put them at risk," id. at 379, thus encompassing "both violent crimes against the person and certain crimes against personal property." Id. at 386 n.203.

12. Non-serious offenses would therefore appear to consist of acts which cause harm to no one, at least if harm is defined in terms of setbacks to the interests Dolovich describes. Insofar as a liberal state can legitimately criminalize an act only if that act causes or risks causing harm, a liberal state would refuse to criminalize non-serious offenses. Dolovich never asks her contractors to decide whether non-harmful acts should be criminalized in the first place. Instead, she asks them to determine what term of incarceration, if any, should be assigned to such acts assuming them to be crimes.

13. See id. at 366-68.

14. See id. at 355 n.142.

fairly distributed.[15] Some citizens live in extreme poverty, with no realistic opportunity to escape. Worse, these disadvantages may well be associated with membership in a particular social group, be it racial, ethnic, religious, or whatnot.

The veil behind which the contractors deliberate is thin enough to allow them to realize they will be entering a partial-compliance world once their deliberations end. But it's thick enough to keep them in the dark about who they will be, or what social position they will occupy, once they step outside. So situated, on what principles will the contractors agree to govern the state's use of punishment?[16]

According to Dolovich, the contractors would agree never to allow imprisonment for non-serious offenses, which would necessarily be a punishment disproportionate to the harm caused,[17] *unless* doing so would "appreciably" deter the commission of a serious offense.[18] Similarly, while imprisonment would be allowed for serious offenses, the contractors would forbid the disproportionate punishment of such offenses, *unless* doing so would deter the commission of an even more serious offense.[19] In no event, however, would the contractors permit the state knowingly to punish the innocent,[20] nor would they permit

15. According to Rawls, the distribution of a society's basic goods would be judged unjust insofar as it failed to conform to the requirements set forth in the "difference principle." See Rawls, supra note 3, at 83.

16. Dolovich summarizes the principles at Dolovich, supra note 2, at 408-09. She also argues that the parties would reject a proposal denying the state any authority to punish, see id. at 379, and that the principles on which the parties would agree will vary depending on whether they assume the risk of erroneous conviction has or hasn't been eliminated. See id. at 385.

17. Dolovich appears to assume that an offender's punishment is proportional to his crime if and when the harm the state imposes on him through punishment is equal to the harm he imposed on his victim through the crime. If so, then proportionality would depend exclusively on the harm an offender causes or risks, without regard to the mental state or culpability with which he acts.

18. See id. at 399. Dolovich also argues that the contractors would insist that any deterrence effect "be shown to be reasonably certain or imminent, on the basis of standards and modes of reasoning acceptable to all." Id. at 409.

19. See id. at 395-96.

20. The contractors realize that the risk of erroneous convictions can never be fully eliminated, but the state is obligated to "do all it can to reform the criminal

the state to punish a person beyond what's necessary to deter crimes of equal or greater seriousness than the crime of conviction.[21] A punishment producing no deterrence is merely "gratuitous."[22]

Together, these principles resemble what's commonly known as the mixed theory of punishment, combining as it does elements associated with both utilitarianism and retribution.[23] Utilitarianism tries to justify punishment in the name of maximizing utility. Punishment reduces crime, and all else being equal, a world with less crime is better than one with more. Yet with its single-minded focus on maximizing utility, utilitarianism would contemplate punishing the innocent, at least if doing so would maximize utility. Likewise, utilitarianism would contemplate punishing the guilty disproportionately, at least, once again, if doing so would maximize utility.

For some, utilitarianism's failure to rule out as a matter of principle the thought of punishing the innocent or disproportionately punishing the guilty is reason enough to abandon it. In contrast to utilitarianism, retribution does stand on principle against punishing the innocent or disproportionately punishing the guilty. Yet retribution, so some think, is a pointless philosophy of punishment, insisting as it does on punishment as an end in itself. Surely the intentional infliction of suffering at the hands of

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justice system in order to reduce as much as possible the danger of convicting the innocent or retaining them in custody." Id. at 409.

21. Id. at 400-01. Following Braithwaite and Pettit, Dolovich dubs this limitation the "parsimony principle." Id. at 401 (citing John Braithwaite & Philip Pettit, Not Just Deserts: A Republican Theory of Criminal Justice (1990)).

22. Id. at 401.

23. For a classic statement of the mixed theory, see H.L.A. Hart, Prolegomenon to the Principles of Punishment, in H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 1 (1968). Although Kant is often described as a retributivist—and his infamous desert island passage in *The Metaphysics of Morals* certainly sounds like a retributivist talking—it bears noting that something of a consensus seems to be emerging that Kant is in fact best interpreted as endorsing a mixed theory of punishment. For defenses of this interpretation, see, for example, B. Sharon Byrd, Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution, 8 Law & Phil. 151, 152-53 (1989); Thomas E. Hill, Jr., Kant on Wrongdoing, Desert, and Punishment, 18 Law & Phil. 407, 429 (1999).

the state must have *some* point beyond "doing justice."[24] How could anyone believe the state should cause suffering for no other good?

The mixed theory is a popular response to the perceived shortcomings associated with utilitarianism and retribution in their pure forms. The mixed theory combines both, in the hope of producing something better. It unites the purpose of utilitarianism with the limits of retribution. Punishment's purpose is utilitarian: to reduce crime and thus protect the rights of all to be secure in their persons and property. But that purpose must be pursued within retribution's limits: the state cannot punish someone unless he commits a crime, nor can it punish him disproportionately in relation to the crime he commits. Moreover, it cannot punish someone if no discernible good would come of it, even if the offender is guilty as charged. Thus, according to the mixed theory, a person can legitimately be punished only if he committed a crime, only in proportion to that crime, and only if doing so would produce a world with less crime.

Now, the contractors' principles look a lot like the principles of the mixed theory.[25] As a general proposition, a person can legitimately be punished under the contractors' principles only if he committed a crime (since punishment of the innocent is inherently illegitimate), and only if it could persuasively be shown that doing so would have some appreciable deterrent effect. The contractors do, however,

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24. While some theories of retribution do insist that punishment serves no good other than the good of giving guilty offenders their just deserts, see, e.g., Michael S. Moore, Placing Blame 157 (1997), other theories point to additional goods. The difference between these latter retributive theories, all of which identify *some* good associated with punishment, and utilitarian theories, which identify crime reduction as the good associated with punishment, turns on the relationship between punishment and its associated good or goods. Utilitarian theories treat that relationship as causal and contingent, while retributive theories treat it as necessary or conceptual. See George P. Fletcher, Punishment and Responsibility, in A Companion to Philosophy of Law and Legal Theory 514, 516 (Dennis Patterson ed., 1996) (describing this class of retributive theories as "conceptually consequential" retributivism).

25. See Dolovich, supra note 2, at 321 (noting that her theory is "analog[ous]" to a mixed theory).

depart from the mixed theory in one important respect: under some circumstances they would allow the state to impose punishments admitted to be disproportionate.[26] Disproportionate punishments are not excluded as a matter of principle. Non-serious offenses can be punished disproportionately if doing so would deter serious offenses, and serious offenses can be punished disproportionately if doing so would deter even more serious offenses.[27]

The contractors are diligent, conscientious, and honest in the work they perform to arrive at their principles. Nonetheless, once they lift the veil and reflect on the fruits of their labors, I think they will be disappointed with them for at least three reasons.

II.

Once the contractors step outside the veil, it seems their attention would fix immediately on the fact that they have authorized the state to imprison them for disproportionate terms. How, they might ask, could that have happened? Something must surely have gone wrong in their reasoning. Disproportionate punishments are, after all, unjust punishments, just because they are disproportionate. Right? That, I think, is the prevailing view. But maybe disproportionate punishments are *not* unjust. Indeed, doesn't the fact that the contractors' principles contemplate such punishments vouch for their moral bona fides?

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26. But cf. id. at 407 n.238 (stating that "moral desert" is a "necessary condition" for "setting the intensity of the punishments imposed," which seems to imply a ban on disproportionate punishments).

27. The contractors also consider principles governing the conditions under which offenders are incarcerated. The parties behind the veil are said to "have a highest-order interest—more urgent than even the protection of their security and integrity . . . —in not having the basis of their moral personhood seriously compromised or undermined altogether," an interest with respect to which "inhumane" punishment would be inconsistent. See Dolovich, supra note 2, at 410-11. Nonetheless, they would, Dolovich argues, agree to authorize the state to impose admittedly inhumane punishments when necessary to deter inhumane crimes. See id. at 417.

Perhaps, but I don't think we should give up so easily on the principle of proportionality.[28] Others who have used Rawlsian methods to tackle the problem of punishment have, contra Dolovich, argued that the contractors would reject disproportionate punishments. For example, Samuel Donnelly believes the contractors would authorize a punishment only if "it serve[d] the goal of crime control,"[29] and only if the "person on whom it is imposed *deserve[d]* that punishment,"[30] which I take it means not only that the person punished is guilty as charged, but also that the punishment imposed is not disproportionate to the crime committed. Likewise, David Hoekema believes that Rawlsian contractors would authorize punishment only if it would reduce crime, only if the person punished is guilty, and only in proportion to the crime committed.[31]

Of course, Dolovich is not alone in thinking that Rawlsian contractors would authorize disproportionate punishments. Thomas Pogge believes they would endorse them, too. He suggests, for example, that in light of the carnage drunk driving causes on American roads—some ten thousand deaths each year—the contractors might well endorse a regime in which "two hundred of the worst offenders are executed annually," since doing so "would presumably have a tremendous deterrent effect and thus would greatly reduce the frequency of the offense."[32] But for Pogge, this conclusion is "mad," and as such should lead one to question the line of thought preceding it.

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28. I assume that the principle banning disproportionate punishments might yield if and when the bad consequences thereby avoided can be fairly characterized as "horrendous." See, e.g., Moore, supra note 24, at 721. As I understand it, however, the contractors would authorize disproportionate punishments, not simply to avoid horrendous consequences, but also simply to secure an appreciable deterrent effect.

29. See Donnelly, supra note 6, at 790.

30. Id. (emphasis added).

31. See Hoekema, supra note 6, at 253, 263.

32. Pogge, supra note 6, at 262. Pogge also suggests that a Rawlsian approach to questions of criminal law and punishment could underwrite greater use of strict liability in the definition of criminal offenses, as well as the elimination of the standard of proof beyond a reasonable doubt. See id. at 258-59.

We should also keep in mind that two methods of moral reasoning are associated with Rawls. The veil of ignorance is one. The other is "reflective equilibrium." This method asks us to move back and forth in imagination between our moral principles and our settled or fixed moral judgments—adjusting the formulation of a principle here; questioning a judgment there—until at last our principles and judgments come into harmony with one another, until they reach equilibrium. In fact, reflective equilibrium may be the "primary argument" supporting Rawls's principles of social justice, with the "contract argument (at best) just help[ing to] express it."[33]

Now, if we subject the contractors' principles of punishment to the discipline of reflective equilibrium, we would start out, I think, with a conflict. The principles could not explain our considered judgments in particular cases; namely, those judgments ultimately premised on a principle forbidding disproportionate punishments. If so, we have a choice: either jettison the judgments (and the principle behind them) or modify the principles with which we began. My own instinct would be to modify the principles, so as at least to include a ban on disproportionate punishments, such that the set of principles with which we end up reflect the traditional formulation of the mixed theory. Deterrence provides the general justification for punishment, but the state must pursue deterrence without either punishing the innocent or disproportionately punishing the guilty.

Indeed, it seems to me that the logic by which the contractors ban any punishment of the innocent should also lead them to ban the disproportionate punishment of the guilty. No state can guarantee it will never make a mistake and punish the innocent, at least not as long as human beings are running the show. The contractors recognize this sad fact. They don't insist the state forgo punishment unless and until it can guarantee with

33. Will Kymlicka, Contemporary Political Philosophy: An Introduction 69 (1990).

metaphysical certainty that only the guilty are punished. But they do insist that punishing the innocent is "inherently illegitimate," and as such the state must do "all it can" to "reduce as much as possible" the risk of such error.

But *why* do the contractors insist on the inherent illegitimacy of punishing the innocent? If they are willing to contemplate the deliberate infliction of disproportionate punishment on the guilty for the sake of deterrence, then why doesn't the same go for the innocent?

The answer, according to Dolovich, goes like this. A contractor who's punished and who's guilty as charged will view his punishment "as to some degree deserved,"[34] but one who's innocent will not. On the contrary, a wrongfully convicted contractor will *resent* the punishment imposed on him, and rightly so, just as the victim of a crime will rightly resent its perpetrator. Resentment is an appropriate response whenever a person has been intentionally wronged,[35] or as Dolovich might put it, whenever one's "sense of justice" is offended. The contractors' sense of justice leads them to resent the state for punishing someone it knows to be innocent because knowingly punishing the innocent is wrong.[36] According, the contractors agree to condemn any such act as inherently illegitimate.

The contractors' sense of justice leads them to different conclusions when it comes to disproportionate punishment. On the one hand, their sense of justice registers no objection, as we've seen, at the thought of a disproportionate punishment imposed to deter crimes of greater severity than the crime of conviction.[37] On the other hand, their sense of justice would take offense at the

34. Dolovich, supra note 2, at 405.

35. I say "intentionally wronged" because, while it seems to me that anger is appropriate whenever a person is erroneously convicted, even when the state secures his conviction in good faith, resentment would only be appropriate if he believed the state convicted him knowing he was innocent.

36. See Dolovich, supra note 2, at 405-07.

37. See id. at 395.

thought of a disproportionate punishment imposed merely to deter repeated incidence of the same crime,[38] though not if they were "certain that all those convicted . . . were guilty as charged,"[39] unless any such disproportionate punishment was *too* disproportionate.[40]

The contractors' sense of justice is hard to understand. If the sense of justice the contractors bring into the original position grounds their belief that punishing the innocent is "inherently illegitimate," why doesn't the same sense of justice simply, and without ado, ground an analogous belief that disproportionately punishing the guilty is also inherently illegitimate?[41] What sense of justice is it that allows the state to punish someone more harshly than he deserves?

III.

Disproportionate punishment of the guilty is one problem with the contractors' principles. Another is that they appear to contemplate the punishment of offenders who, one might reasonably believe, should be excused for their crime.

Recall that the contractors are legislating for a partially compliant state. Such a state falls short in two ways. First, it fails to honor the full demands of the "rule of law," and second, it fails to honor the full demands of justice in the distribution of society's "primary goods."[42] Most (if not all) states can plausibly be said to fall short in these ways to some extent, depending on what exactly

38. See id. at 396.

39. Id.

40. See id. at 398-99, 405 n.236.

41. Lacking any basis upon which to condemn disproportionate punishments as a matter of principle, the contractors are sometimes forced to criticize real-world policies and practices on curious grounds. For example, they question the legitimacy of mandatory minimum or three-strikes sentencing systems, not because such systems too often mandate disproportionate punishments, but rather because they threaten to produce "obstacles to careful deliberation." See id. at 429-34.

42. Id.

justice and the rule of law turn out to require.[43] If so, then most (if not all) states are more or less partially compliant. But not all partially compliant states are created equal.

At one extreme is a state that provides for none or very few of the procedural guarantees normally associated with due process of law, and no guarantee of equal protection of the laws. Or perhaps it promises due process and equal protection, but makes no effort to honor those promises. Moreover, the way in which this state distributes the society's primary goods fails to pass any credible test of distributive justice. On top of all that, the state knows it's acting unjustly. Such a state is not merely partially compliant. It's tyrannical. It lacks any moral standing to demand that those subject to its rule (or at least those who don't benefit from its tyranny) obey its laws. Conversely, those subject to its rule have no corresponding obligation to obey, not even a prima facie one. The "laws" of such a state don't really deserve to be called laws at all.[44] Indeed, the state itself is nothing more than a criminal—a "gunman . . . writ large"[45]—and the poor souls caught in its racket have no recourse but to escape or revolt.

At the other extreme is a state with laws on the books which secure some reasonable measure of due process and equal protection. It also tries conscientiously to enforce those laws. But perhaps its due process protections are weaker than they would be in a fully compliant society. Maybe it should spend more money on indigent criminal defense. Perhaps something similar is true of its equal protection guarantees. Maybe it extends the protection of strict scrutiny to fewer groups than it should. So too we can imagine that this state redistributes wealth in order to provide its citizens with a safety net, but that its efforts in

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43. Cf. id. at 374 n.183 ("No actually existing society has ever achieved the conditions of Rawls's well-ordered society . . . .").

44. Much more would need to be said in order to defend such claims, given the fact that they seem to presuppose a theory of natural law. For an attractive version of such a theory, see Philip Soper, A Theory of Law (1984), and Philip Soper, The Ethics of Deference (2002).

45. An image made famous in H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 603 (1958).

this regard nonetheless fall short, perhaps significantly short, when measured against the distribution of social goods one would observe in a fully compliant society.

Now, while the first state lacks moral standing to punish, I suspect the same cannot be said of the second. Moreover, although each of the above-described states is non-compliant, the contractors are not (as I understand it) meant to assume the society into which they will emerge could be a tyranny. If so, then the real debate focuses on states looking more or less like the second one. How does the fact that a state is non-compliant, but not so much so as to degenerate into tyranny, bear on its legitimacy to punish in particular cases involving offenders suffering from severe deprivation and disadvantage?

Most of the literature addressing this question asks whether and in what circumstances such an offender should be eligible to claim an excuse, at least or especially when the crime charged is a property offense. The debate is long-standing and familiar. Most of the participants appear to agree that some defense of necessity should be available in extreme cases.[46] The destitute mother who steals bread to save her starving children is the chestnut used to make the point. Indeed, insofar as deprivation and disadvantage can reduce an offender's culpability, most participants appear to agree that some form of defense—whether it be a full or partial excuse to liability,[47] or a

46. Debate in such cases is usually limited to how such a defense should be characterized. Is it an excuse or a justification? On this point, see George P. Fletcher, Material Poverty—Moral Poverty, in From Social Justice to Criminal Justice: Poverty and the Administration of the Criminal Law 264, 267-68 (William C. Heffernan & John Kleinig eds., 2000).

47. For arguments generally in favor of some such excuse, see, for example, David L. Bazelon, The Morality of the Criminal Law, 49 S. Cal. L. Rev. 385 (1976); Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation, 3 Law & Ineq. 9 (1985); R. George Wright, The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived, 43 Cath. U. L. Rev. 459 (1994); Barbara Hudson, Punishing the Poor: Dilemmas of Justice and Difference, in From Social Justice to Criminal Justice: Poverty and the Administration of the Criminal Law, supra note 46, at 189. For arguments generally opposed, see, for example, Stephen J. Morse, The Twilight of Welfare Criminology: A Reply to Judge Bazelon, 49 S. Cal. L. Rev. 1247 (1976); Stephen J. Morse, Deprivation and

mitigation of sentence[48]—should in principle become available at *some* point short of the extreme.[49] Disagreement centers on where that point lies, and whether conditions in contemporary democracies are such that some offenders charged with some offenses have reached it.

Although current law declines to recognize an excuse under such circumstances, whether and under what circumstances it should is a topic of serious debate, at least in academic circles. Indeed, it's a question about which we should debate. The contractors, however, are not free to debate it. The contractors, knowing full well they were legislating for a non-compliant society, nonetheless adopted principles making no apparent provision for any such excuse.[50]

Once the contractors emerge from behind the veil, they can and should complain if the state is not living up to the demands of distributive justice or the rule of law. Likewise, if the state is not honoring the principles of legitimate punishment, they can and should complain about that, too. But if the state *is* honoring those principles, the contractors have no basis upon which to question—let along complain about—the legitimacy of the punishment imposed on any particular individual, no matter how disadvantaged he or she may be. So long as the state acts within the principles, no one can question its legitimacy to punish. The possibility that a particular offender might, depending on the circumstances, warrant some form of excuse is simply beyond the ken of the contractors.[51]

Desert, in From Social Justice to Criminal Justice: Poverty and the Administration of the Criminal Law, supra note 46, at 114 [hereinafter Morse, Deprivation and Desert].

48. For arguments along these lines, see, for example, Andrew von Hirsch, Censure and Sanctions 107-08 (1993); Michael Tonry, Racial Disproportion in US Prisons, 34 Brit. J. Criminology 97, 112 (Special Issue 1994).

49. See, e.g., Morse, Deprivation and Desert, supra note 47, at 143 ("At a certain point, of course, we may wish to say that choices were so constrained that the agent morally had no choice, but this will rarely be the case.").

50. Cf. Dolovich, supra note 2, at 370 n.176, 371 n.179.

51. The contractors may overlook the need for such an excuse in part because they seem to have in mind a narrow understanding of the conditions under which

IV.

The contractors would, it seems to me, be well advised to adopt a ban on disproportionate punishments, and to leave open the possibility of an excuse or mitigation for some crimes committed in the face of serious economic duress. But even if they adopted those amendments, I think their principles would still disappoint. The problem here goes deep, touching as it does the way in which the contractors see and relate to one another, both inside and outside the veil.

The contractors realize they have to live with one another. Their task is to identify the principles, including principles of punishment, expressing the basic terms of their coexistence. In so doing, the contractors regard one another as moral equals. Yet, truth be told, they see each other in this light only because the veil keeps them in the dark. Being ignorant of who they might end up being, prudence, not genuine respect, counsels them to treat one another as equals.[52] Accordingly, the contractors agree to a set of basic rights, including the right to security and integrity. The ultimate importance of these rights derives from the fact that they enable everyone to pursue his or her particular vision of the good life, consistent with everyone else's like pursuit. Moreover, the contractors agree to be respectful of one another's rights, not so much because they

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an excuse is warranted. The contractors appear to assume that an excuse is only warranted if the offender suffers from a cognitive incapacity rendering him unable "to understand the difference between right and wrong." This understanding of the conditions warranting an excuse would include cases of insanity, but it would exclude cases of duress. Duress ordinarily constitutes an excuse, not because the offender lacks the capacity to understand or appreciate the wrongfulness of his conduct, but rather because he lacks a fair opportunity under the circumstances to conform his conduct to the requirements of law. Those who claim that material deprivation or poverty can reduce an offender's culpability to the point of excuse usually argue that an offender facing such deprivation or poverty may lack a fair opportunity to conform, not that he lacks the capacity to understand.

52. Cf. Kymlicka, supra note 33, at 69 (suggesting that the "contract device" attempts to "render vivid" the "true meaning of equal concern" but actually ends up "obscur[ing]" it).

actually respect one another, but because they fear what might happen otherwise.

This conception of the relationship between the contractors implies a particular understanding of crime and punishment. A crime is an intentional violation of one citizen's rights at the hands of another. It constitutes a breach of contract for which the offender must pay the agreed-upon damages, cashed out in the form of punishment. Punishment is an instrumental exercise of coercion needed to achieve compliance with the law. The hardship or suffering of punishment is the price a wrongdoer has agreed to pay in order to keep serviceable an effective system of rational deterrence, subject to certain side constraints. The emotional economy at work here runs on fear. Victims fear being re-victimized. Prospective victims fear becoming actual victims. Wrongdoers fear the prospect of being caught and punished.[53]

Not an especially attractive picture. Fortunately, there's an alternative one, which presupposes a deeper connection among the contractors. It presupposes the contractors regard one another, not with a false sense of respect constructed out of self-interest and ignorance, but with genuine respect. Members of this community respect one another because they see and regard one another as beings possessed of equal dignity. This common dignity, they understand, entitles each of them to be treated and not treated in particular ways. Those who intentionally violate their security or integrity treat them in ways inconsistent with that dignity.[54]

Crime and punishment take on a different meaning for the members of such a community. Someone who commits

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53. The implication here is that fear is not a particularly worthy motive for compliance with the law. For an argument to the contrary, see Thomas E. Hill, Jr., Punishment, Conscience, and Moral Worth, 36 S. J. Phil. 51, 67-68 (1997) (supplement).

54. The notion of respect I have in mind here is what Stephen Darwall has referred to as "recognition respect." See Stephen L. Darwall, Two Kinds of Respect, 88 Ethics 36, 40 (1977) ("[R]ecognition respect . . . . includes a component of regard. To have recognition respect for something is to regard that fact as itself placing restrictions on what it is permissible for one to do.").

a crime, who defies the law protecting a fellow citizen's security and integrity, not only violates his victim's rights. He also shows contempt for his victim's dignity and status as a moral equal, and in so doing expresses a false claim to moral superiority.[55] "I matter," he says. "You don't." The dominant emotion among victims of crime is not fear. The dominant emotion is anger, and more particularly, resentment. Victims resent the wrong done to them. Crime is an affront to their dignity. Similarly, other members of the community, who identify with the victim, are indignant when they contemplate the wrong the victim has suffered, since the wrong done to the victim is in an extended sense a wrong done to them.[56]

Punishment in such a community is not simply a mechanism of rational deterrence. Instead, it is in the first instance the means by which the state condemns or censures the offender's wrongdoing. Punishment expresses the resentment and indignation to which, among members of a community, crime naturally and properly gives rise.[57] At the

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55. See, e.g., Hampton, supra note 1, at 1686 (wrongdoing conveys a false "message of superiority over the victim"). This analysis applies most obviously to what Dolovich would call "serious offenses" or what criminal lawyers would call *malum in se* offenses. In cases involving *malum prohibitum* offenses, this analysis would require one to say (assuming we wish to treat such offenses as crimes warranting punishment) that the law itself is vested with dignity, that as such it is entitled to respect, and that an offender who defies the law thereby shows contempt for it. It would also require describing the conditions under which the law is indeed vested with such dignity and entitled to such respect.

56. Based on what she says with respect to the "managing of emotions," see Dolovich, supra note 2, at 374-78, Dolovich might respond that emotions such as resentment and indignation are "understandable," or even "appropriate," but such emotions can also get the better of us, causing us to lose sight of the fact that offenders are, despite their wrongdoing, still members of the community. In response to this risk she calls for *dispassion*. But perhaps the better response would be to call for *more* passion. Crime and punishment in the real world will always involve emotion and the language of emotion. The challenge is not to exclude the language of anger and resentment (even if it were possible to do so) but to bring into the conversation the language of redemption, forgiveness, reconciliation, and atonement. Indeed, a large part of the appeal of the restorative justice movement is attributable to the emphasis it places on such emotions. For a recent overview of restorative justice and the movement associated with it, see John Braithwaite, Restorative Justice and Responsive Regulation (2002).

57. See, e.g., Joel Feinberg, The Expressive Function of Punishment, in Joel

same time, punishment achieves certain ends: it vindicates the victim's equal moral worth, expresses the community's solidarity with the victim, humbles the wrongdoer's defiant will, and annuls the false message of moral superiority implicit in the wrongdoer's conduct.[58] These are, we might say, the ends of retribution. They are the goods which give retribution its point, and which can only be secured through the hardship of retributive punishment.

Of course, the members of such a community identify not only with the victims of crime. They also identify with its perpetrators. A wrongdoer is a member of the community, possessing the same dignity as all other members. At the same time, he is a member whose conduct has expressed contempt for another. As such he forfeits his good standing in the community, all the while remaining a member of it. Ideally, a wrongdoer will experience guilt when he realizes what he's done. Far from fearing punishment, he will welcome it as a form of secular penance through which he can expiate his guilt.[59] Having served his penance, he will have earned the forgiveness of those he wronged, and with such forgiveness comes reconciliation. Thus, among members of a community who truly regard one another with equal concern and respect, punishment not only censures the crime and vindicates the

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Feinberg, Doing and Deserving 95, 98 (1970).

58. See, e.g., Herbert Fingarette, Punishment and Suffering, 50 Proc. & Addresses Am. Phil. Ass'n 499, 510 (1977) ("Punishing is the humbling of the defiant—or at least the disrespectful—will."); George P. Fletcher, Domination in Wrongdoing, 76 B.U. L. Rev. 347, 354 (1996) (Retributive punishment "expresses solidarity with the victim and restores the relationship of equality that antedated the crime."); Jean Hampton, An Expressive Theory of Retribution, in Retributivism and Its Critics 1, 12 (Wesley Cragg ed., 1992) ("Retributive punishment is a way of denying a false message about worth, and thus a way of vindicating the worth of those who have been victims of wrongdoing."); Hampton, supra note 1, at 1686 ("[R]etribution is a response to a wrong that is intended to vindicate the value of the victim . . . [and] confirm[] them as equal by virtue of their humanity.").

59. The idea of punishment as a form of secular penance is most prominently associated with the work of Antony Duff. See Antony Duff, Punishment, Communication, and Community 106-15 (2001). For a further development of this idea, see Steven Tudor, Accepting One's Punishment as Meaningful Suffering, 20 Law & Phil. 581 (2001).

victim. It also, ideally and more ambitiously, provides the vehicle for atonement and reconciliation.[60]

Consider the following thought experiment.[61] Imagine you are a contractor behind the veil, and you agree to live by the proposed principles. You now step outside the veil and into a world where those principles determine if, when, and how much punishment is warranted in a particular case. Now imagine a terrible crime—fill in the details as you wish—has just been committed in your community. The offender has been arrested and duly convicted. Imagine further, however, that punishing the offender will do no good, in the limited sense that it will produce no deterrence whatsoever.[62] What do you do?

If you see the world and your relationship with others through the eyes of the contractors, then you have only one choice. You must let the offender go. You cannot legitimately punish him. You might force him to pay compensation for any harm the victim has suffered. But if punishing him would, as I've asked you to imagine, serve no good in terms of deterrence, then any such punishment would be gratuitous and illegitimate.[63] If you are unable or unwilling to accept such an outcome, if instead you believe the offender should be punished, even if doing so would have no payoff in deterrence, then the experiment has made its point. You see your connection with others more deeply than the contractors can or do, and you believe punishment is not simply about deterrence.

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60. See, e.g., Stephen P. Garvey, Punishment as Atonement, 46 UCLA L. Rev. 1801, 1819-27 (1999) (arguing that punishment understood as a form of secular penance is a necessary step toward reconciliation).

61. Thought experiments of the kind described in the text are a well-known device for challenging mixed theories of punishment. See, e.g., Moore, supra note 24, at 97-102.

62. Participants in the thought experiment often assume that punishing the offender must have *some* deterrent effect. The burden is thus placed on the experiment's creator to come up with some story to account for why it will not. Dolovich's theory begins with the opposite assumption. It assumes that punishment will have no deterrent effect unless and until the state comes forward with evidence showing to a reasonably certainty that it will. See Dolovich, supra note 2, at 403.

63. See id. at 406 n.238.

All in all, the contractors are asked to treat each other as strangers. So when the principles of punishment they adopt turn out to be principles befitting strangers, we shouldn't be surprised. Yet most of us, it seems to me, do not live in a world of strangers, nor would we want to. We do resent wrongs done to us, as we should. Moreover, most of us recognize that we should (even if we don't) experience the pain of guilt when we wrong another, and that we should (even if we don't) at least try to forgive those who wrong us, if and when they expiate the guilt of their wrongdoing through the burden of punishment-cum-penance. If I'm wrong, however, if most of us in fact see ourselves as living in a world of strangers, then that's a fact we should face with regret.

CONCLUSION

The contractors set out on a laudable quest: to find principles of legitimate punishment with traction in an imperfect world and against which to measure the practices of punishment in the real world. They should be commended for the hard work and care with which they've pursued their goal. Indeed, they've done more and gone farther than anyone who's embarked on a similar quest. It's entirely possible that I've misunderstood the principles to which they've agreed or why they've agreed to them. But if not, then it seems to me their principles are in need of revision.